IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979
478-6276

- -X

VINCENT VIDAL, :

Petitioner, :

- against - :

THE PEOPLE OF THE STATE OF NEW YORK, :

Respondent. :

- -X

REPLY BRIEF IN SUPPORT OF PETITION

Bernard G. Ehrlich
Charles Sutton
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New York, New York 10007
212-964-8612

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On Petition For a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department and the New York Court of Appeals

Reply Brief in Support of Petition

Statement

This reply brief is submitted in support of the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Department, and the New York Court of Appeals.

Point I

The facts establishing that the Appellate Division had only about one-half of the trial transcript before it for the review of the appeal were presented to the Appellate Division itself by the petitioner and were not opposed or disputed by the respondent.

In its brief at page 10, the respondent argued that "petitioner can point to no record on the basis of

which he can substantiate this contention .... that a substantial portion of the trial transcript was never before that court." The respondent is incorrect. The petitioner, by the affirmation of Charles Sutton dated April 27, 1978 set forth the facts showing that the Appellate Division did not have before it for the review of the petitioner's appeal the full trial transcript, that the Appellate Division had before it only about one-half of the trial transcript, and that pages "1200 (1500) to 3213/1" were not before the Appellate Division (Infra, 3a), (Petition, p.12). The record before the Appellate Division (by the affirmation of Charles Sutton dated April 27, 1978) recited the facts (Infra, 1a-5a). (The petitioner's attorney Charles Sutton conferred with Assistant District Attorney Helman Brooks, Chief of the Appeals Bureau of the Kings County District Attorney's office and informed him of those facts including the investigation and confirmation of these facts by the Kings County Supreme Court Appeals Bureau Clerk). The District Attorney did not oppose the petitioner's motion to the Appellate Division and submitted no papers whatever in opposition. (Petition pp. 12, 3a). When the District Attorney had the opportunity to deny or to challenge the facts presented by the petitioner to the Appellate Division, the District Attorney did not deny the facts and did not challenge the facts that the Appellate Division did not have for review of the Vidal appeal almost one-half of the trial transcript (Petition pp. 12, 3a). The Appellate Division itself, when it had the opportunity to refute or deny those facts presented, did not do so. (Petition page 3a). Rather, the Appellate Division implicitly confirmed the facts that it did not have before

if the full trial transcript for the review of the appeal by its order dated and entered June 26, 1978, which denied petitioner's motion wherein the Appellate Division showed that the denial was based "upon the papers on which the appeal was determined" (Petition 3a). That language is confirmatory of the facts set forth in the affirmation of Charles Sutton dated April 27, 1978 that the Appellate Division did not have before it on its review of the appeal the full trial transcript. The Appellate Division knew what was before it on the review (petition, p. 3a). The Appeals Bureau Clerk knew the exact pages of the trial transcript that he had received from the Appellate Division after the decision on the appeal (Petition, p. 12) (Infra, pp. 1a-5a). No responsible attorney would allege that the trial transcript before the Appellate Division had missing from it pages "1200 (1500) - 3213/1" (Petition, page 12) (Infra 3a) which constitutes almost one-half of the trial transcript, unless those facts had been investigated and confirmed (petition, page 12) (Infra, pp. 1a-5a.) It is notable that the respondent still does not deny the facts that the Appellate Division had only about one-half of the trial transcript on its review of this appeal (Resp. pp. 10-11). The respondent argues that because the Appellate Division denied petitioner's motion, and New York Court of Appeals Judge Fuchsberg denied petitioner leave to appeal to the New York Court of Appeals that "It would thus appear that there indeed must have been a complete record on appeal before that court" (Resp. pp. 10-11). The argument is unreasoned, baseless and a non-sequitur. The Appellate Division's order denying

the petitioner's motion contradicts the respondent's argument by its statement that its denial was made "upon the papers upon which the appeal was determined" (Petition, p. 3a).

There is no presumption of regularity applicable to this case. The facts were explicitly presented to the Appellate Division showing that it did not have before it almost one-half of the trial transcript. The Appellate Division, if those were not the facts, easily would have said so. It did not say so. Indeed, the language it used in its order was confirmatory of the facts explicitly and directly set forth in the affirmation of Charles Sutton dated April 27, 1978 that pages "1200 (1500) - 3213/1" were <u>not</u> presented to and were not before the Appellate Division on its review of this appeal (Infra 1a-5a).

The respondent alleged in a footnote on page 11 of its brief that "we note that his appropriate remedy would appear to be a post-judgment motion pursuant to New York Criminal Procedure Law Article 440 by which petitioner can attempt to adduce testimony on the record to substantiate his claim." The respondent is incorrect. New York Criminal Procedure Law Article 440 is totally inapplicable. No post-judgment relief issue is involved on these facts that the Appellate Division had only about one-half of the trial transcript before it on the appeal. (Infra, 6a-8a).

The fact of the absence of a full record for the review of the appeal was presented by the petitioner to the Appellate Division in the only way available under

New York law, namely, by motion to the Appellate Division itself. There is no other way under New York law, known to petitioner, to present this issue. The lower court has no review jurisdiction or supervisory jurisdiction over its superior court, the Appellate Division. The determination of the extent of the trial transcript which was before the Appellate Division for its review of the appeal is not reviewable or determinable by a lower court. No procedure for such an inquiry by a lower court exists under New York Law.

Point II

The petitioner was denied his statutory and constitutional right to have the trial events fully recorded and to have the full record reviewed on appeal.

In addition to the facts and issue set forth in Point I, the petitioner was denied his right (CPL 460.70(3)) (Petition Point XIII, pp. 67-70) to have the trial proceedings duly recorded, by the refusal after explicit demand by petitioner to have the court reporter transcribe the words of the tape recordings played to the jury by the prosecutor.

The respondent has alleged in its brief at pp.26-27 that there is a practice that the Appellate Division will listen to tape recordings. The respondent's argument is contrary to the facts. There is no practice whatever of the Appellate Division "to listen to tape recordings". The Appellate Division does not listen to tape recordings as part of its review on appeal

of a trial record. The tape recordings could not be reviewed by the Appellate Division as tape recordings. The tape recordings of the conversations between Barbarino and police officer Florio (there were no tape recordings of the voice of the petitioner) were introduced into evidence and played to the jury. The trial court refused the petitioner's demand to have that evidence which the jury was hearing transcribed by the court reporter (Petition, pp.67-70). The prosecutor had represented to the trial court and defense counsel, after demand by defense counsel, that he would furnish defense a transcript of each tape recording. (11/1/74:52-53;11/4/74:66-67). However, the prosecutor did not produce any transcript at any time (11/13/74;954,955;989,990).The trial court nonetheless, over objection, allowed the prosecutor to play the tape recordings to the jury,and, over objection, to do so without having the court reporter make a trial record of what the jury heard. (Petition,p.68). The petitioner was denied his constitutional rights to due process of law and to have a review on appeal.(Petition, Point XIII).

Point III

The defendant was denied his fundamental right to due process of law and to a fair trial by the knowing use by the prosecution of false and perjured testimony.

The respondent at pages 12-14 of its brief attempted to avoid the charges of prosecutorial misconduct by argumentative conclusory assertions. Notably, the respondent did not deny that a promise of lifetime

probation had in fact been made to Rosario Barbarino prior to his testimony in this trial. (Resp. pp. 12-14). The respondent did not deny that Barbarino became a police informer on or about December 28, 1973 (Resp. Br. pp. 12-14). The recommendation of Assistant District Attorney Arnold Taub to the Barbarino sentencing court is a matter of official record of the Supreme Court, which record was presented to the Appellate Division. Penal Law Section 65.00(1)(b) requires that before any defendant can be sentenced to a period of probation "the prosecutor either orally on the record, or in a writing filed with the indictment recommends that court sentence such person to a period of probation upon the ground that such person has or is providing material assistance in the investigation, apprehension or prosecution of any person for a felony defined in article two hundred twenty or the attempt or the conspiracy to commit any such felony, ...", together with other requirements. (Underscoring added). Assistant District Attorney Arnold Taub, Chief of the Narcotics Bureau of the Kings County District Attorney's office, made such written recommendation dated January 27, 1975 to the trial court, pursuant to Penal Law Section 65.00(1)(b). In that written recommendation, A.D.A. Arnold Taub declared that Barbarino had surrendered to the police on the morning following December 27, 1973 (the date on which Barbarino had made an alleged drug sale to undercover police officer Florio) and that "Immediately upon his surrender, the defendant agreed to cooperate with the police Department by giving information regarding trafficking in drugs. He has continued to do so to date, and will continue subsequent to

the plea. His information has already resulted in numerous arrests, and active investigations are still in progress, begun, as a result of his information. In addition to the above, the defendant (Barbarino) agreed to, and in fact testified in the trials of both Vidal and Russo on behalf of the People ... The defendant (Barbarino) ... has and is continuing to provide material assistance in the investigation and apprehension of people for a felony defined in Article Two Hundred Twenty of the Penal Law, or the attempt or the conspiracy to commit such felony, ...". (Matter in parenthesis added). (Petitioner's Brief to Appellate Division, pp. 19a-20a).

It is important to consider and note that "....a defendant cannot automatically avail himself of the provisions of section 65.00 (subd. 1, par.(b)) even by cooperating with the police and other prosecutorial authorities." People v. Eason, 40 N.Y. 2d 297, 302 (1976). See also, People v. Lofton, 81 Misc. 2d 572, 366 N.Y.S. 2d 769 (Sup. Ct. Cr. T. 1975); People v. O'Neil, 85 Misc. 2d 130, 379 N.Y.S. 2d 244 (Sup. Ct., Cr. T. 1975). Absent a promise, express or implied, made to a defendant of a future recommendation "given or relied upon by defendant (Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427) ... the District Attorney is free to exercise his discretion". People v. Lofton, 81 Misc. 2d 572, 366 N.Y.S. 2d 769, 777. In this case, Henry M. Gargano, Esq., the attorney for Rosario Barbarino, testified by sworn deposition at the direction of Kings County Supreme Court Justice Arthur Hirsch "to give the date and arrangements made with the District Attorney and what the promise of the District Attorney was to Mr. Gargano if he

gave them certain information" (Infra, 9a-20a) that "The District Attorney at that time or on a subsequent time, which was shortly thereafter ... I would assume about a week, had advised me after I requested that a commitment be given in writing, that they could not give any positive commitment in writing or orally. However, they did assure me that if the defendant rendered sufficient cooperation with them, they would do whatever they could on his behalf with the end in mind of the possibility of lifetime probation ... Although I never received a direct promise from the District Attorney's office, it was my understanding that the Assistant District Attorney who I spoke to had agreed to do everything in his power to get a lifetime probation for Rosario Barbarino in exchange for his information and cooperation with the Police Department. I was convinced in my own mind that that would be an agreement. However, I got nothing in writing from the District Attorney's office nor any guarantee other than my conversations with that District Attorney. I was further advised by the Assistant District Atterney that the District Attorney's office had made such arrangements before in a similar manner and had carried out their end concerning lifetime probation." (Infra 17a-18a). The original agreement made in December 1973 between the District Attorney and Barbarino (through his attorney, Henry M. Gargano, Esq.) did not include a requirement that Barbarino give testimony against petitioner Vidal or another defendant, Thomas Russo (Infra, 17a).

Prosecution witness Rosario Barbarino was named a defendant in three (3) separate indictments,

namely 7824/1973, 7825/73, and 7826/73 (Petitioner's Brief to Appellate Division, p. 14a). The question and answer recited at page 13 of the Respondent's brief does not "tend to indicate that no promise of lifetime probation had been made by the District Attorney's office at the time Barbarino testified at trial." (Resp. Br. p. 13). It does indicate that Mr. Gargano was under pressure from the prosecutor not to disclose the promise of recommendation of lifetime probation. (See, Infra, 18a-19a).

Contrary to the assertions of respondent in its brief at pp.13-14, Barbarino did not 'decide to turn state's evidence following the motion to consolidate and at some point during the suppression hearing' ; the District Attorney knew since December 28, 1973 that Barbarino had become an informant and would not be tried for his crimes (Supra, pp.7,8; Pet.,pp.23-24.) The trial transcript(794) shows that the prosecutor misrepresented to the court and counsel as charged (Infra, p. 32a).The prosecutor also misrepresented that petitioner was involved in the Barbarino December 1, 1973 drug sale to the undercover poice officer (Infra, p. 32a). Only Barbarino had been indicted for that crime, indictment number 7825/73 (11/1/74:50-51). The prosecutor had declared on the record at the time of his motion to consolidate indictments 7824 and 7826 that "Yes, there is another sale I had on Barbarino. I am not joining the case with the others because he is charged on that alone. Now, there are tapes that refer to that particular sale. That will not be joined against the other defendants. That's 7825. That's where he is charged alone."(11/1/74:50-51). Since Barbarino was a police informer since December 28, 1973, and since the indictments were returned much later, the prosecution knew that Barbarino acted alone contrary to his assertions(794, infra,p.32a). Those misrepresentations turned the scales against petitioner testifying at trial.

The trial court added a conspiracy charge against the petitioner at trial and tried petitioner for the crime of conspiracy even though the indictment did not charge any conspiracy and did not even allege that petitioner acted in concert with anyone.

New York State Constitution Article 1 Section 6 expressly declares and provides that "No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in case of militia when in actual service, and (sic) the land, air and naval forces in time of war or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury.... No person shall be deprived of life, liberty or property without due process of law."

The two indictments against petitioner did not

charge the petitioner with any conspiracy count and did not charge or allege that he had acted in concert with anyone. (Infra, pp.25a-31a). There was no basis in the indictment to authorize the trial court to charge petitioner with the crime of conspiracy and to allow into evidence hearsay testimony under the alleged conspiracy exception to the rule against hearsay.

The allowance by the trial court of testimony of the conversations between prosecution witness Rosario Barbarino and police officer Florio which were conducted outside of the presence of the petitioner to prove not merely that the two had spoken the words, but to prove the truth of the words spoken by each of them, and to prove a conspiracy between Barbarino and the petitioner, denied the petitioner his fundamental right to due process of law and to a fair trial. Additionally, the trial court, at the commencement of the trial, during trial, and in its charge to the jury instructed the jury on the crime of conspiracy and authorized and directed the jury to convict the petitioner of the crimes charged in the indictment upon the trial court's conspiracy charge.

The defendant was convicted upon illegal and hearsay evidence introduced by the prosecution through Florio and Barbarino and upon the trial court's preliminary charges, rulings, and final charges of "acting in concert" with Barbarino and being involved in a "conspiracy" with Barbarino, as to the "transactions" charged under the indictment, to which Barbarino "confessed", and which "confessions" and "admissions" of crime by Barbarino were offered by the prosecution and the trial

court as evidence of defendant's guilt of the crimes charged. (Infra, 21a-31a). (11/1/74; 50 59; 11/4/74; 10-29; 722, 723, 728, 751, 774, 791, 792-791, 789-809, 818, 827-835, 3197-3205, etc.). The indictment did not allege that the defendant "acted in concert" with anyone and did not allege any conspiracy charge. The defendant was denied his constitutional rights thereby. Cole v. Arkansas, 333 U.S. 196 (1948); Thompson v. Louisville, 362 U.S. 199 (1960); Price v. Georgia, 398 U.S. 323 (1970); Stirone v. U.S., 361 U.S. 212 (1960); Berger v. U.S., 295 U.S. 78 (1935); People v. Batcheler, 57 A.D. 2d 1059 , 395 N.Y.S. 2d 846 (4th Dept. 1977).

Conclusion

The petition should be granted.

Respectfully submitted,

Bernard G. Ehrlich
by Charles Sutton

Bernard G. Ehrlich
Charles Sutton
299 Broadway
New York, New York 10007

Dated: March 23, 1979

SUPREME COURT: APPELLATE DIVISION
SECOND DEPARTMENT

'78 APR 28 AM 9:13

People of the State of New York,

Respondent,

v.

Vincent Vidal,

Defendant-Appellant.

CHARLES SUTTON, an attorney duly admitted to practice law in New York practice affirms under penalty of perjury:

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APPELLATE DIVISION
SECOND DEPARTMENT

1) I am the attorney for the plaintiff and I personally familiar with the facts set forth herein except as to

2) This affirmation is submitted in support of appellants motion for an order to restore this appeal to the appeal calendar of this Court for actual argument.

3) In addition to the reasons set forth in my moving affirmation submitted with the Notice of Motion, the defendant-appellant respectfully requests that the appeal be restored to the appeal calendar of this Court for argument because this Court did not have in its possession and therefor did not read and review over fifteen hundred pages (1500) of the trial transcript representing the trial period between November 19, 1974 and November 29, 1974.

4) The total number of pages of the trial transcript was approximately 3,000 pages.

5) This court therefore did not have before it and did

not read and review approximately one-half of the trial transcript on this appeal.

6) The facts whereby this condition was caused arose out of simple human error and oversight.

7) At the time that the transcripts were delivered to me by the Kings County Clerk's Office Appeals Bureau (following this Court's order granting defendant forma pauperis relief) they were delivered in small boxes. Individual inspection of the boxes was not made. After I brought the boxes of transcripts to my office, the defendant's family requested permission to copy the transcript so that the defendant could read it. I thought that would be all right and I told the defendant's sister, Millie Mignano and the defendant's girl friend, Sally Hickey, that they could do that.

Thereafter, while I was out of the office, Miss Sally Hickey came to my office, and by my permission, of which I had instructed the office receptionist, took out the typed trial transcripts from the office and photocopied them. She returned the typed trial transcripts to my office. Thereafter she spoke to me and told me that there had been two typed copies of some parts of the trial transcript and that she therefor took one of the sets of the two typed copies, as they appeared, in order to save money on the reproduction cost. I thought nothing of it at the time. It seemed all right to me and a sensible thing for her to do to save money on the reproduction costs.

8) After the decision on their appeal, in view of the testimony and of the appellant's points and arguments on appeal, as set forth in the appellant's brief, a question was raised in my mind that this Court may not have had the full trial transcript for review.

I therefore personally checked the pages of the trial transcript that the Appeals Bureau of the Kings County Clerk's Office had in its possession which they had received back from the Appellate Division after the Court had rendered the decision on the appeal. That review showed that the trial transcript which the Appeals Bureau had received back from the Appellate Division was incomplete, and that the trial transcript for pages 1250 (1500) to 3213/1 were missing.

9) The Clerk of the Appeals Bureau telephoned to the Clerk's office at the Appellate Division in my presence and inquired if the Appellate Division had any copies of the typed transcript that they had not returned to the Appeals Bureau. The Clerk at the Appellate Division reported, as I was informed by the Appeals Bureau Clerk, that the Appellate Division Clerk had no other typed transcripts in this case at the Appellate Division. Following that, I telephoned Millie Mignano, the defendant's sister and Sally Hickey, the defendant's girl friend. At my request, the defendant's girl friend visited the defendant who is jailed at Greenhaven Correctional Institution and retrieved for me the typed transcripts in his possession.

which are the 1500 pages which this Court never saw or had in its possession of which she had delivered to the defendant.

10) I brought that transcript copy, along with my own typed transcript copy and showed them to Mr. John Addeo, a Clerk in the Appeals Bureau at the Kings County Supreme Court.

11) It is clear that this Court simply did not have at least 1500 pages of the trial testimony and was thereby unable to review the appeal under the circumstances.

12) One, if not the prime reason why the missing pages were overlooked was that the period of November 18, 1974 to November 29, 1974 was taken at trial and transcribed by a different court reporter and that fact was stated in a statement in the trial transcript at pages 1254-1500 as follows:

> "Note that Sandor Weisberger is substitued in the part for Allen B. Shalfi from the 18th of November to the 29th at which time Mr. Shalfi has been temporarily reinstated."

13) The fact that this portion was missing was overlooked apparently because the sequencing continued apparently unbroken from front to back of that clip bound volume. The missing part in the middle of the clip bound volume was not apparent. It was apparently listed as one complete volume, or box for the full number of pages even though, in the middle, some 1500 pages were not there.

It is respectfully requested that this appeal be restored to the appeal calendar of this Court and that the

defendant appellant be accorded his statutory and constitutional rights to have a review on appeal from the judgment herein upon a complete record.

Charles Sutton

Charles Sutton

Dated: April 27, 1978

TITLE M—PROCEEDINGS AFTER JUDGMENT

ARTICLE 440—POST-JUDGMENT MOTIONS

Sec.

§ 440.10 Motion to vacate judgment

1. At any time after the entry of a judgment, the court in which it was entered may, upon motion of the defendant, vacate such judgment upon the ground that:

(a) The court did not have jurisdiction of the action or of the person of the defendant; or

(b) The judgment was procured by duress, misrepresentation or fraud on the part of the court or a prosecutor or a person acting for or in behalf of a court or a prosecutor; or

(c) Material evidence adduced at a trial resulting in the judgment was false and was, prior to the entry of the judgment, known by the prosecutor or by the court to be false; or

(d) Material evidence adduced by the people at a trial resulting in the judgment was procured in violation of the defendant's rights under the constitution of this state or of the United States; or

(e) During the proceedings resulting in the judgment, the defendant, by reason of mental disease or defect, was incapable of understanding or participating in such proceedings; or

(f) Improper and prejudicial conduct not appearing in the record occurred during a trial resulting in the judgment which conduct, if it had appeared in the record, would have required a reversal of the judgment upon an appeal therefrom; or

(g) New evidence has been discovered since the entry of a judgment based upon a verdict of guilty after trial, which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more

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favorable to the defendant; provided that a motion based upon such ground must be made with due diligence after the discovery of such alleged new evidence; or

(h) The judgment was obtained in violation of a right of the defendant under the constitution of this state or of the United States.

2. Notwithstanding the provisions of subdivision one, the court must deny a motion to vacate a judgment when:

(a) The ground or issue raised upon the motion was previously determined on the merits upon an appeal from the judgment, unless since the time of such appellate determination there has been a retroactively effective change in the law controlling such issue; or

(b) The judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal; or

(c) Although sufficient facts appear on the record of the proceedings underlying the judgment to have permitted, upon appeal from such judgment, adequate review of the ground or issue raised upon the motion, no such appellate review or determination occurred owing to the defendant's unjustifiable failure to take or perfect an appeal during the prescribed period or to his unjustifiable failure to raise such ground or issue upon an appeal actually perfected by him; or

(d) The ground or issue raised relates solely to the validity of the sentence and not to the validity of the conviction.

3. Notwithstanding the provisions of subdivision one, the court may deny a motion to vacate a judgment when:

(a) Although facts in support of the ground or issue raised upon the motion could with due diligence by the defendant have readily been made to appear on the record in a manner providing adequate basis for review of such ground or issue upon an appeal from the judgment, the defendant unjustifiably failed to adduce such matter prior to sentence and the ground or issue in question was not subsequently determined upon appeal. This paragraph does not apply to a motion based upon deprivation of the right to counsel at the trial or upon failure of the trial court to advise the defendant of such right; or

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(b) The ground or issue raised upon the motion was previously determined on the merits upon a prior motion or proceeding in a court of this state, other than an appeal from the judgment, or upon a motion or proceeding in a federal court; unless since the time of such determination there has been a retroactively effective change in the law controlling such issue; or

(c) Upon a previous motion made pursuant to this section, the defendant was in a position adequately to raise the ground or issue underlying the present motion but did not do so.

Although the court may deny the motion under any of the circumstances specified in this subdivision, in the interest of justice and for good cause shown it may in its discretion grant the motion if it is otherwise meritorious and vacate the judgment.

4. If the court grants the motion, it must, except as provided in subdivision five, vacate the judgment, and must dismiss the accusatory instrument, or order a new trial, or take such other action as is appropriate in the circumstances.

5. Upon granting the motion upon the ground, as prescribed in paragraph (g) of subdivision one, that newly discovered evidence creates a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant in that the conviction would have been for a lesser offense than the one contained in the verdict, the court may either:

(a) Vacate the judgment and order a new trial; or

(b) With the consent of the people, modify the judgment by reducing it to one of conviction for such lesser offense. In such case, the court must re-sentence the defendant accordingly.

6. Upon a new trial resulting from an order vacating a judgment pursuant to this section, the indictment is deemed to contain all the counts and to charge all the offenses which it contained and charged at the time the previous trial was commenced, regardless of whether any count was dismissed by the court in the course of such trial, except (a) those upon or of which the defendant was acquitted or deemed to have been acquitted, and (b) those dismissed by the order vacating the judgment, and (c) those previously dismissed by an appellate court

8a

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

----------x

VINCENT VIDAL,

Plaintiff,

-against-

ROSARIO BARBARINO and HENRY M. GARGANO,

Defendants.

----------x

DEPOSITION of HENRY M. GARGANO, Defendant, taken by the Plaintiff, pursuant to Notice, held at the Clerk's office, Supreme Court, Kings County, Brooklyn, New York, on August 4, 1977, commencing at 2:10 p.m., before James Hendrickson, a Shorthand (Stenotype) Reporter and Notary Public of the State of New York.

BRADDICK REPORTING CO.
Depositions Hearings EBT'S
150 NASSAU STREET
NEW YORK, N. Y. 10038
(212) RE 2-3415

9a

APPEARANCES:

For the Plaintiff:

CHARLES SUTTON, ESQ.,
299 Broadway
New York, New York 10007

For the Defendant Gargano:

HENRY M. GARGANO, ESQ., Pro Se,
123 7th Avenue
Brooklyn, New York.

* * *

H E N R Y M. G A R G A N O, having been first duly sworn by a Notary Public of the State of New York, was examined and testified as follows:

EXAMINATION BY MR. SUTTON:

Q Mr. Gargano, what is your full name, address and occupation?

A Henry M. Gargano, 123 7th Avenue, Brooklyn, New York. I'm an attorney.

Q Mr. Gargano, on December 28, 1973 did you represent Rosario Barbarino?

A That's correct.

Q To your knowledge, were you informed that Rosario Barbarino was accused of the sale of a drug on or

about December 27, 1973?

A That's correct.

Q On December 28, 1973, did you arrange for the surrender to the police of the said Rosario Barbarino?

A That's correct.

Q Do you recall what station house you surrendered the defendant Rosario Barbarino to?

A I believe it was the office of the Brooklyn South Narcotics which was then housed on 4th Avenue and 30th Street.

Q Following the surrender of Mr. Barbarino, did Mr. Barbarino agree to cooperate with the Police Department and furnish information for the benefit of the police?

A I'm going to object to that question.

(Mr. Sutton and Mr. Gargano went before Judge Hirsch for rulings.)

THE COURT: It is the direction of the Court that the witness is to give the date and arrangements made with the District Attorney and what the promise of the District Attorney was to Mr. Gargano if he gave them certain information.

(Whereupon, all parties returned

to the Hearing Room.)

A At the time of the surrender, the police lieutenant in charge of the narcotics section had suggested that possibly Mr. Barbarino could render or could give them certain information that would be helpful to them. They in turn would speak to the District Attorney's office concerning this type of situation.

Q And this conversation with the lieutenant in charge of the narcotics unit at Brooklyn South, was that on December 28, 1973?

A I believe so.

Q Thereafter did you discuss the arrangement suggested by the lieutenant for the benefit of Rosario Barbarino with the District Attorney's office?

A I did.

Q Would you tell us the date or approximate date or dates and the arrangements made with the District Attorney and if you can remember the name of the District Attorney that you spoke to and also tell us what promise was made to you for Rosario Barbarino in return for Rosario Barbarino becoming an informant for the Police Department?

A Approximately a week after the surrender of Rosario Barbarino, I was in touch with the Kings

County District Attorney's office. The exact name of the District Attorney I don't remember at the time. I was in touch with him by telephone and I spoke to an Assistant District Attorney at that office who was in a supervisory capacity. He was familiar with the case. I at that time tried to exact positive commitments from him concerning a possible disposition of the defendant Barbarino.

Q When you say "disposition," specifically what did you discuss?

A I attempted at that time to exact a commitment that Barbarino would be guaranteed a lifetime probation.

Q What was the response of the District Attorney?

A The response of the District Attorney at that time was that he wouldn't give such a commitment.

Q "Such a commitment," meaning an absolute gurantee?

A That's correct.

Q What kind of an agreement did he give? What was the promise of the District Attorney in return for Barbarino working for the District Attorney's office or the Police Department?

A The District Attorney at that time or on a subsequent time, which was shortly thereafter --

Q Within a week or so?

A I would assume about a week.

-- had advised me after I requested that a commitment be given in writing, that they could not give any positive commitment in writing or orally.

However, they did assure me that if the defendant Barbarino rendered sufficient cooperation with them, they would do whatever they could on his behalf with the end in mind of the possibility of a lifetime probation.

Q In order to clarify the language, I know you are trying to be as accurate as you can, did you obtain from the District Attorney's office what you understood to be a promise of lifetime probation in return for Rosario Barbarino working for the Police?

A Although I never received a direct promise from the District Attorney's office, it was my understanding that the Assistant District Attorney who I spoke to had agreed to do everything in his power to get a lifetime probation for Rosario Barbarino in exchange for his information and cooperation with the Police Department.

I was convinced in my own mind that that would be an agreement. However, I got nothing in writing from the District Attorney's office nor any guarantee other than my conversations with that Assistant District Attorney.

I was further advised by the Assistant District Attorney that the District Attorney's office had made such arrangements before in a similar manner and had carried out their end concerning lifetime probation.

Q Did there come a time in April, in the first week of April on about April 3rd, 1974, when Rosario Barbarino was indicted for the sale of cocaine on December 27, 1973 and he was arrested and arraigned in the Supreme Court, Kings County, and was that April, 1974?

A I believe it was.

Q On that date when the arraignment was heard, if your recollection serves you, was it not Justice Starkey before whom the arraignment took place, Supreme Court, Kings County, Criminal Term?

A I believe it was, yes.

Q At the time of the arraignment, did the Assistant District Attorney in that part demand bail

against the defendant Rosario Barbarino in that indictment which was before Justice Starkey which was number 7825 of '73 in the amount of $50,000?

A I believe he did, yes.

Q At that time did you inform at side bar and off the record, did you inform the District Attorney, the Assistant District Attorney and Judge Starkey of the arrangement that you had made with the District Attorney for Rosario Barbarino as you stated above?

A Yes, I believe I did.

Q At that time did Justice Starkey state that taking your word, that he would reduce bail to $25,000 but until the District Attorney directly confirmed the arrangement that he would not reduce it more?

A I believe that was the conversation I had with him, yes.

Q Later that day, in the afternoon of that same day, did some assistant district attorney come from the Narcotics Bureau of the District Attorney's office inform the judge at side bar and off the record of the arrangement which you just stated above about a lifetime probation status for Rosario Barbarino?

A I don't know whether he informed the judge as to lifetime probation, but I do know that he had

informed the judge that Rosario Barbarino or informed the judge of Rosario Barbarino's agreement with the District Attorney's office.

Q As a result of that conversation, was the bail reduced?

A Yes, it was.

Q To the sum of $500?

A I believe it was, yes.

Q Mr. Gargano, to your knowledge, did the arrangement with the District Attorney's office include at the time it was made in December of 1973 a requirement on the part of Rosario Barbarino to testify against either or both Vincent Vidal or Thomas Russo at the trial?

A No.

Q So the arrangement for lifetime probation as you testified to just involved his work with the Police and giving information to the Police and the District Attorney's office without at that time the requirement that he give testimony against either Vincent Vidal or Thomas Russo?

A That's correct.

Q When for the first time did you learn, Mr. Gargano, that the District Attorney's office wanted to have Rosario Barbarino as a witness against Vincent

Vidal at trial?

A Shortly before I believe or around the same time that the suppression hearings was scheduled to start or had started.

Q That would be around the first week in November, 1974. Does that refresh your recollection?

A I believe it was around that time.

Q What was your impression when demand was made by the Trial Assistant District Attorney prosecuting the case of the People against Vincent Vidal when that prosecuting attorney demanded that Rosario Barbarino testify against Vidal?

A It was my impression that Rosario Barbarino had to continue a course of cooperation with the District Attorney's office if we expected and by "we," I mean my client, Barbarino, to receive a direction or request by the District Attorney's office to the Chief Administrative Judge requesting that Barbarino receive lifetime probation.

Q Did Rosario Barbarino testify against Vincent Vidal at trial in the case of the People against Vincent Vidal?

A To the best of my knowledge, he did.

Q Thereafter did the District Attorney make

a written recommendation to the appropriate judge for lifetime probation and recommend lifetime probation for Rosario Barbarino?

A Yes, the District Attorney's office did.

Q Was the defendant Rosario Barbarino thereafter duly sentenced to a lifetime probation for all the charges against him?

A Yes, he was.

HENRY M. GARGANO

Subscribed and sworn to
before me this 18 day
of August 1977.

CERTIFICATE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, JAMES HENDRICKSON, a Notary Public within and for the State of New York, do hereby certify:

That HENRY M. GARGANO, the witness whose deposition is hereinbefore set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

And I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 5th day of August, 1977.

James Hendrickson
JAMES HENDRICKSON

INDICTMENT

no. 7824/73

Supreme Court of the State of New York
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK
against
XJ. VINCENT VIDAL
XJ. ROSARIO BARBARINO
X. THOMAS RUSSO
Defendant

INDICTMENT NO. 7824/1973 n
112/32-A

COUNTS

CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE

CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE - 2 counts

CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE

A TRUE BILL

EUGENE GOLD
District Attorney

Foreman

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury one and more preparations, compounds, mixtures and substances of an aggregate weight of one and more ounces and more containing a narcotic drug, to wit: cocaine.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug to wit: cocaine, with intent to sell the same.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 20, 1973, in the County of Kings, knowingly and unlawfully possessed one and more preparations, compounds, mixtures and substances of an aggregate weight of one and more ounces containing a narcotic drug, to wit: cocaine.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury, a narcotic drug, to wit: cocaine.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, to wit: cocaine, with intent to sell the same.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, each aiding the other and being actually present, on or about November 8, 1973, in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: cocaine.

EUGENE GOLD
DISTRICT ATTORNEY

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INDICTMENT

7826/73

#7826/73

Supreme Court of the State of New York

COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

against

[redacted] Defendant

INDICTMENT NO. [redacted] 7826/73

THIS PAGE IN ITS ORIGINAL FORM FILED WITH THE COURT IS AS ILLEGIBLE AS APPEARS HERE.

COUNTS

[redacted]

A-I felony
2+07. A-I felony
narc drug w/intent to sell A III fel
1+02 narc A-II fel.
2+02 narc C fel

Foreman

EUGENE GOLD
District Attorney

7-G
8-G
9 G
10 G
11 G
12 G
13 G
14 G
15 G
16 G
17 G
18 G

25a

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL SALE OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully sold to a person whose name is known to the Grand Jury one or more preparations, compounds, mixtures and substances, of an aggregate weight of one and more ounces containing a narcotic drug, to wit: cocaine.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE THIRD DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, to wit: cocaine, with intent to sell the same.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and ROSARIO BARBARINO, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIRST DEGREE, committed as follows:

The defendants, VINCENT VIDAL and ROSARIO BARBARINO, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a substance consisting of one and more preparations, compounds, mixtures and substances of an aggregate weight of two ounces and more containing a narcotic drug, to wit: cocaine.

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FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SECOND DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed one and more preparations, compounds, mixtures, and substances of an aggregate weight of one ounce and more containing a narcotic drug, to wit: cocaine.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: opium.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: amphetamine.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973, in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: methaqualone.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE SEVENTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed a controlled substance, to wit: barbiturates.

NINTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE IN THE FIFTH DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly and unlawfully possessed one or more preparations, compounds, mixtures and substances of an aggregate weight of one-eighth ounce and more containing a narcotic drug, to wit: marijuana.

TENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendants, VINCENT VIDAL and DENNIS VITALE, of the crime of CRIMINALLY USING DRUG PARAPHERNALIA IN THE SECOND DEGREE, committed as follows:

The defendants, VINCENT VIDAL and DENNIS VITALE, each aiding the other and being actually present, on or about December 27, 1973 in the County of Kings, knowingly possessed materials suitable for the packaging of individual quantities of narcotic drugs or stimulants, to wit: a quantity of manila envelopes, scales, empty capsules, spoon, and a strainer, under circumstances evincing an intent to use and under circumstances evincing knowledge that some person intends to use the same for the purpose of unlawfully manufacturing, packaging and dispensing of any narcotic drug or stimulant.

EUGENE GOLD
DISTRICT ATTORNEY

ELEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant, DENNIS VITALE, of the crime of OBSTRUCTING GOVERNMENTAL ADMINISTRATION, committed as follows:

The defendant, on or about December 27, 1973, in the County of Kings, did intentionally obstruct, impair and pervert the administration of law and other governmental function and did prevent and attempt to prevent a public servant, to wit: JOSEPH TOAL, a Police Officer of the Police Department of the City of New York, from performing an official function by means of intimidation, physical force, and interference and by means of any independently unlawful act.

TWELFTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant DENNIS VITALE, of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A FELONY, committed as follows:

The defendant, DENNIS VITALE, on or about December 27, 1973, in the County of Kings, Unlawfully had in his possession a firearm, to wit: a revolver, loaded with ammunition, such possession not being in the defendant's home or place of business.

THIRTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant VINCENT VIDAL of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A MISDEMEANOR, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973, in the County of Kings, unlawfully had in his possession a firearm, to wit: a revolver.

FOURTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant VINCENT VIDAL, of the crime of POSSESSION OF WEAPONS AND DANGEROUS INSTRUMENTS AND APPLIANCES, AS A MISDEMEANOR, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973, in the County of Kings, unlawfully had in his possession a firearm, to wit: a revolver. The subject matter of this count being different than that set forth in the thirteenth count of the within indictment.

FIFTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF KINGS, by this indictment, accuse the defendant, VINCENT VIDAL, of the crime of CRIMINAL POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE, committed as follows:

The defendant, VINCENT VIDAL, on or about December 27, 1973 in the County of Kings, with intent to benefit himself and a person other than an owner thereof, knowingly possessed stolen property, to wit: a revolver, owned by GEORGE NELSON.

EUGENE GOLD
DISTRICT ATTORNEY

testimony to conversations, as to conversations other than those that relate to the sale of December 7 in which the defendant is not charged. I will permit the District Attorney to do so.

MR. SUTTON: Your Honor--

THE COURT: And you have an objection and an exception.

MR. SUTTON: Yes, I do have an objection, Your Honor and I think I've stated it many times before.

THE COURT: Yes.

MR. SUTTON: Now, Your Honor, with respect to the December 7 item that Mr. Farkas was referring to, does Mr. Farkas state on the record that that December 7 sale which is charged against Mr. Barbarino has nothing whatever to do with Mr. Vidal?

MR. FARKAS: It does have EVERYTHING to do with Mr. Vidal, but he couldn't be indicted because Rosario Barbarino did not tell us what happened on December 7 until the day of the suppression hearing. Had he been an informant at the time, Vidal would have been indicted for that sale also.

MR. SUTTON: Are you contending that Mr. Vidal and Mr. Barbarino are involved in an alleged sale on December 7?

MR. FARKAS: I believe it's December 7 and it involves nine ounces for $8,100.00, $400.00 of which you

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